b. **Differences Based on Cost Savings and Economies of Scale**

The Act also provides that price differences justified by cost differences are not discriminatory and thus not subject to the proscriptions of section 19. Costs should be construed broadly to include all cost recognized by precedents under either the cost-justification defense of the Robinson-Patman Act or under section 202(a) of the Communication Act. Further, the Commission's regulations should provide that cost differences do not have to be based on precise accounting data, but that reasonable estimates will suffice.

The Commission asks in its Notice whether it should attempt to construct a "reasonable region" in which prices can fall which are presumed to be justified. Discovery doubts that such an approach is feasible.

c. **Other Price Differences That Should be Permitted by the Commission.**

The Commission should consider price differentials to be discriminatory only when they have a reasonable prospect of injuring competition. Thus, price differences that are either _de minimus_ in amount or not sustained over time cannot injure competition and should be presumed to be outside the scope of section 19 just as they are presumed not to fall within the Robinson-Patman Act's proscription.[10/] The Commission should

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10/ Precedents under the Robinson-Patman Act recognize that temporary and/or _de minimus_ price differences cannot injure competition. _Chrysler Credit Corp. v. J. Truett Payne, Inc._, 670 F.2d 575, 581 (5th Cir. 1982) (_de minimus_ price

Continued

define a de minimus price difference should be defined as one which will not cause a consumer to switch to other programming.

Similarly, price differences falling within the same range offered by nonintegrated programmers should be presumed outside the scope of the statute. It is unlikely that such price differences were imposed on integrated cable programmers if nonintegrated programmers routinely engage offer such price differences. Indeed, the fact that price differences within a certain range are a common practice of all distributors, both integrated and nonintegrated, suggests that such discrimination is a normal and justified reaction to market circumstances. Moreover, to the extent that nonintegrated programmers' prices vary, integrated programmers should be permitted to meet that competition.

In any event, unjustified price differentials of such a magnitude as to preclude or significantly hinder a multichannel video programming distributor from providing satellite programming to consumers could possibly injure competition. Moreover, given the significantly lower fixed costs incurred by alternative technology distributors in delivering program services (when compared to cable), even a large price difference would not handicap them.

Finally, the Commission should also presume that a high price is not harmful to competition if it is lower than the

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difference not unlawful); King, Inc. v. Kraft, Inc., 645 F. Supp. 126, 130 (D. Md. 1986) (temporary price difference not actionable).

perceived market value of the programming based on objective third-party studies. Recent studies conducted by the widely respected, independent firm, Beta Research, indicate that even the highest prices consumers pay for The Discovery Channel are considerably lower than the consumer-perceived value of its programs. The price consumers do pay for The Discovery Channel average 55¢; but the average price consumers indicate they are willing to pay is $1.86.

d. <u>Presumptions</u>

To the extent that a price differential is presumed nondiscriminatory, the Commission's regulations should provide that the presumption can be overcome only if the complainant can demonstrate both (i) significant injury to consumers in terms of either higher rates or inability to view desired programs and (ii) a price differential higher than prices charged to the complainant by similarly situated nonintegrated programmers. Once the presumption is rebutted, the programmer would have to demonstrate that at the time it charged the price at issue, it was reasonable to do so. In determining whether a cable programmer had a reasonable basis for a price difference, the Commission should regard as reasonable any justification that the Commission has permitted in Section 202(a) proceedings as well as justifications permitted by the Robinson-Patman Act and precedents under it.

To the extent that a price differential is presumed discriminatory, the programmer should be able to rebut the presumption by showing either (i) that at the time it charged the differentially higher price, it had a justification for doing so or (ii) that there has been no actual injury to competition. See Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1144 (D.C. Cir. 1988).

2. The Scope of the Exclusive-Dealing Prohibition

a. Exclusive-Dealing Contracts

Although The Discovery Channel does not have any exclusive contracts, it recognizes that they can be used to promote distribution and thus has an interest in any regulations the Commission might adopt concerning exclusive dealing. Exclusive dealing has many procompetitive benefits and is not usually considered to be harmful to competition.[11/]

Exclusive-dealing arrangements have the potential to injure competition if they foreclose a needed source of supply. In the context of cable programming, neither a multichannel video program distributor nor the ultimate consumer is injured by an exclusive contract between another cable operator and a programmer if substitute programming is available. As mentioned above, for the purpose of determining injury to competition, the substitute programming does not have to be identical to the programming foreclosed by the exclusive-dealing contract. It

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11/ See P. Areeda, VIII Antitrust Law ¶ 1611c. For example, "restraints such as exclusive distribution may facilitate entry of a new producer in a market [such as The Learning Channel] by enabling distributors to recover initial market development costs." U.S. Department of Justice Vertical Restraint Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,105 at 3.1.

merely has to be sufficiently attractive to have the realistic potential of attracting a sufficient number of viewers to allow a second multichannel video distributor to survive in a market. Indeed, to the extent that different yet attractive programming is offered by competing multichannel video program distributors, the ultimate consumer benefits from greater choice and more diversity.

b. **Conduct Related to Exclusive-Dealing**

The Commission's Notice asks whether other practices besides exclusive dealing should be subject to regulation, citing the Act's language which applies to "prctices, understandings, arrangements and activities, including exclusive contracts . . . that prevent a multichannel video programming distributor from obtaining such programming." This statutory language should be interpreted to mean that Congress was concerned with substance, not form. Thus, the Commission's regulations should provide that the Act's restrictions apply not just to contracts that are labeled "exclusive dealing contracts," but to all contracts that have the effect of an exclusive-dealing contract, i.e., it if effectively precludes any multichannel video programmer from obtaining adequate programming to compete against an entrenched cable operator. For example, a high rate differential could have the same effect as an exclusive-dealing contract.

However, a restriction that does not effectively exclude a programmer from making programming available to other multichannel video program distributors should not be regarded as falling within the statutory prohibition. For example, practices such as the renegotiation and time-delay requirements set forth in paragraph 31 of the Notice should not be subject to section 19 restrictions. As long as a multichannel video program distributor is not foreclosed from the ability to obtain programming, competition among distributors to obtain programming preferences, like all competition, should be encouraged. Moreover, programmers should be able to offer certain preferences, such as time delay provisions, as an inducement to distributors to market their programming.

c. The Need for Prior Approval

As the Commission's Notice states, prior approval of exclusive dealing contracts should not be required and would be unduly burdensome, both to the Commission and the programmer. Notice ¶ 33. A programmer should only be required to inform the Commission whether or not it has an exclusive contract if a significant complaint is made. A significant complaint would be one based on something more than a refusal by a programmer to sell programming to the distributor. For example, the Commission might require evidence that no other similarly situated distributor has been able to obtain programming.

d. The "Public Interest Exception"

The Commission also seeks comment with respect to interpretation of the "public interest" exception to the prohibition of exclusive dealing in areas served by a cable operator with an attributable interest in a programmer. The Act identifies certain factors which the Commission "shall consider," but does not limit the Commission's ability to consider other factors. The first factor that must be considered is "the effect . . . on the development and competition . . ." This should be construed to permit exclusive-dealing contracts where they have no adverse effect on competition. In other words, the Commission should permit exclusive-dealing contracts whenever there is sufficient alternative programming available to other distributors to enable at least one other distributor to compete effectively against the cable operator who has entered into the exclusive contract.

The second public interest factor identified in the Act is the "effect . . . on competition from . . . technologies other than cable." The Act's emphasis on "technologies" rather than any particular distributor is significant; Congress wanted to encourage alternative technologies, not insure the survival of every entrepreneur who uses an alternative technology. Thus, as long as there is sufficient substitute programming to allow alternative technologies to develop, the Commission should permit exclusive dealing contracts with cable operators even when such contracts deny a particular competitor using an alternative technology from satisfying all of its program preferences.

The third and fourth factor concern "the effect . . . on capital investment in the production and distribution of new satellite cable programming" and the "effect . . . on diversity of programming" respectively. As mentioned above, exclusive-dealing contracts for particular programs necessarily stimulate the production of new and diverse programming as distributors seek out alternatives. As long as alternative programming is available or can be developed, consumers will benefit to the extent that a distributor using a new technology features different programming rather than just duplicates what is already available. Just as cable operators enriched the diversity of programming by investing in new programming rather than just relying on TV reruns, so too new technologies can invest in new programming.

V. ENFORCEMENT ISSUES

Discovery favors an enforcement approach that will resolve complaints as rapidly as possible at the lowest cost to both the Commission and the party subject to the complaint. Accordingly, Discovery favors rules that resolve disputes without a hearing, minimize document production burdens, protect confidentiality, and provide for early dismissal of frivolous complaints. Moreover, the Commission should require that complaints be plead with specificity, including nonconclusory factual allegations concerning injury to competition, not just injury to a competitor. As under Rule 11 of Federal Rules of Civil Procedure, a complainant's attorney should be subject to penalty for filing a complaint that lacks a reasonable basis.

The Commission also asks whether specific benchmarks can be established to screen out frivolous complaints. Discovery believes that appropriate benchmarks could be devised. To the extent that either (i) the subject of a complaint is in fact selling a substantial volume of programming to alternative technologies or (ii) the market is currently served by more than a single cable operator (even though the statutory definition of effective competition may not be met) a complaint should be required to plead with factual specificity precisely how the alleged discrimination will harm competition in the market. Absent a plausible explanation, the complaint should be dismissed, and even if a plausible explanation exists, the complaint must be held to a higher standard of proof.

To the extent a complainant survives dismissal, the complaint's discovery should be limited to two carefully tailored document requests, no more than 30 interrogatories, and no more than five depositions lasting no more than six hours each. Commission rules should specify that all discovery must be completed within six months of filing the complaint.

The Commission asks whether an alternative dispute resolution should be required. While the Commission should encourage parties to engage in such a process, it should not require it. In some cases, settlement is not realistic. Requiring an additional step in the proceeding will only increase costs to the involved parties.

VI. PROGRAM CARRIAGE ISSUES UNDER SECTION 12

Section 12 of the Act imposes restrictions on cable operators, such as precluding them from conditioning carriage on obtaining a financial interest in the programmer or "coercing" programmers to grant exclusive rights or engage in discriminatory practices.

Discovery has never been subjected to such tactics. To the contrary, Discovery has had affirmatively to persuade cable operators to make an investment in it when nobody else would, and even then has had difficulty obtaining carriage for The Discovery Channel and The Learning Channel on systems owned by its cable operator investors.

And, as noted above, in the majority of cases, program carriage decisions are made at the local level by managers of individual cable systems, not nationally or even regionally by the major owners of cable systems. Discovery has also found that the local decision-makers are not influenced by the fact that their own owners are partial owners of Discovery.

Given this experience, Discovery urges the Commission to adopt narrowly tailored regulations that would not discourage cable operators from supplying much-needed capital to programmers or embroil Discovery in a dispute just because one of the cable operators chooses its programming rather than that of a nonintegrated competitor. Terms such as "coerced" and "required" should be defined as narrowly as possible to avoid confusion with normal good-faith negotiations. One approach would be simply to define them as conduct that could not reasonably be considered good-faith negotiations.

The Commission's regulations also should expressly state that the existence of a financial investment or of an exclusive-dealing contract is not evidence of "coercion" or "required" conduct. Discovery should not be required to incur the cost and disruption of having to defend the process by which its owners selected Discovery programming.

VII. CONCLUSION

In sum, the Commission should adopt rules that allow Congress' goals to be achieved in the least restrictive manner without undue market disruption.

Respectfully submitted,

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